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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

NO. 328

J. C. CONNER

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES,
Trustees of the property of
FLORIDA EAST COAST RAILWAY COMPANY,
a corporation

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner, J. C. Conner, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, affirming the judgment entered for respondents pursuant to a directed verdict by the Circuit Court for the Eleventh Judicial Circuit of Florida in this action under the Federal Employers' Liability Act, 45 U.S.C. Sec. 51 et seq.

OPINIONS BELOW

The opinion of the Third District Court of Appeal is reported at 109 So. 2d 183 and is set out in Appendix A. The order of the Supreme Court of Florida of July 16, 1959, denying certiorari, is unreported and is set out in Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Did the Florida Appellate Court err in holding that "even under the unexacting test" adopted by the Supreme Court of the United States in **Rogers v. Missouri Pacific R. Co.** 352 U.S. 500, an injured railroad worker was not entitled to go to the jury in an action under the F.E.L.A. where the record showed:

Plaintiff, a hose cutter, was injured while performing his duties when the trap door on a set of platform steps in the vestibule of a car fell and mashed his thumb as he used the steps in the normal and customary manner; the train, including the car and steps in question had just been inspected and such inspections, if done properly, reveal the defects, if any, which could cause the door to fall during normal use; and it was the duty of the railroad's inspection mechanics to lock the door properly upon completion of the inspection process?

STATUTE INVOLVED

The pertinent Section of the F.E.L.A., 45 U.S.C. Sec. 51, is set out in Appendix C.

STATEMENT

On August 26, 1955, plaintiff was employed by the railroad as a hose cutter. (R. 26) In the performance of his duties, it became necessary for him to use the steps on one of the railroad's cars to get from one side of a train to the other. (R. 95-96) The steps are counter-balanced with a trap door, so that when the door is up the steps are down and vice versa. (R. 43)

As plaintiff stepped off the last step, he was holding a grab iron with his left hand. The trap door fell down, mashing his left thumb. (R. 95-97) The uncontradicted record shows that plaintiff, as a member of the yard crew, had absolutely nothing to do with the operation or inspection of the trap door or steps. (R. 49-50) The steps were in a down position ready for use when plaintiff arrived on the scene, and all he did was use them in the normal and customary manner. (R. 66, 95-97)

When the steps are operating properly, the trap door is latched in the up position and the door stays up and the steps down until the door is latched. (R. 43-45, 81-84)

The accident occurred at a passenger station while the train was being made up. (R. 23-25, 73-76) The train had come from Buena Vista yard at 29th Street, where it had been steam cleaned and inspected. (R. 73-76, 122-

127) This routine inspection specifically included inspection of "the vestibules, steps, trap doors, latches, locks. . . ." (R. 123) With regard to inspection of the specific mechanisms that caused the accident, the record shows the following:

"Q When you inspect the vestibule area, what do you look for?

A Look for any defects we can find.

Q Would that include the trap door and the steps?

A Yes, sir.

Q Would that include the latches in that area that hold the trap door and steps?

A Yes, sir.

Q If those doors are closed or down, does the inspector actually open them or operate them?

A Yes, sir, you operate them both ways, open and close." (R. 123-124)

* * *

Q If the inspector, and again, I'm talking about this fellow is actually conducting the inspection inside, if he inspects the vestibule and checks the operation, say, of the trap door and steps, can he leave them in the open position? In other words, do you on occasion after you conduct that inspection, leave the trap door up and the steps down in the vestibule area?

A We do on occasions. That is, we leave them latched open.

Q If you leave them in the open position, is it up to the man making the inspection to make sure it is firmly latched?
A Oh, yes. (R. 125)

* * *

Q Do you ever find defects, sir, when you are conducting these examinations and inspections?
A Yes, we do find defects.

Q Do you ever find broken latches?
A Find broken springs and the pin missing or the pin halfway out.

Q Does that affect the operation of the trap door and steps?
A It will not hold the trap door up." (R. 127)

On the foregoing evidence the Third District Court of Appeal affirmed a directed verdict for the railroad, stating at 109 So. 2d 184:

> "To hold that the evidence as to this accident could with reason support a finding that the employer's negligence contributed to produce the injury would be close to, if not all the way toward holding that an accident, in absence of an uncontrovertible explanation to the contrary, is enough to create a reasonable inference that the employer's negligence produced it. It seems reasonable to assume that the Rogers case intended no such result . . . "

FEDERAL QUESTION RAISED

The complaint and demand for jury trial (R. 1-2); opening statement (R. 8-18); and opinion on appeal (R. 162-165); all show petitioner's repeated and continuous assertion of his rights under the F.E.L.A.

REASONS FOR GRANTING THE WRIT

Petitioner urges this Court to grant this petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, for the following reasons:

1. The decision below is in conflict with this Court's decisions in **Rogers v. Missouri Pacific R. Co.**, 352 U.S. 500; **Atlantic Coast Line Railroad Co. v. Stinson**, 355 U.S. 62; **Lavender v. Kurn**, 327 U.S. 645; **Tennant v. Peoria & P. U. Ry Co.**, 321 U.S. 29; **Schulz v. Pennsylvania R. Co.**, 350 U.S. 523; and numerous other decisions of this Court holding that negligence in F.E.L.A. cases may be proved by circumstantial evidence.

The present record shows a door which could not fall unless the locking mechanism was defective or unless it was improperly latched by the last user. Where the last user was the railroad's own inspector who could and should have discovered any defect and who was responsible for proper latching upon completion of the inspection (R. 122-127), the "proofs justify with reason the conclusion that employer negligence played [some] part, even the slightest, in producing the injury or death for which damages are sought." **Rogers v. Missouri Pacific R. Co.**, 352 U.S. 500 at 506.

As the **Rogers** case held at 352 U.S. 508:

> "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof even though entirely circumstantial, from which the jury may with reason make that inference."

In the footnote to the foregoing statement from the **Rogers** case, the following appears:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. The Robert Edwards, 6 Wheat. 187, 190, 5 L. Ed. 238."

2. The decision below, if permitted to stand, will materially frustrate the Congressional intent to afford injured railroad employees rights under the F.E.L.A. In this type of case, direct testimony to show defects or negligent conduct is often impossible to obtain. To deny F.E.L.A. juries the right to infer negligence where, as here, the "proofs justify with reason the conclusion" is "to take away a goodly portion of the relief which Congress has afforded them." **Bailey v. Central Vermont Ry.**, 319 U.S. 350, 354.

3. The decision below is clearly wrong and denies a colored railroad employee relief to which he is clearly entitled under federal law.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

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Miami 32, Florida

Attorney for Petitioner.

APPENDIX A

OPINION AND JUDGMENT OF THE DICTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT—JANUARY TERM, A.D. 1959

Case No. 58-94

J. C. CONNER,

Appellant,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, Trustees of the property of FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Appellees.

Opinion filed February 12, 1959.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

Nichols, Gaither, Green, Frates & Beckham and Sam Daniels for appellant.

Scott, McCarthy, Preston, Steel & Gilleland and Dwight Sullivan for appellees.

CARROLL, CHAS., Chief Judge

The appellant J. C. Connor, a hose cutter for the defendant railroad who was injured in the course of his employment, filed this action against his employer under

the Federal Employers' Liability Act, 45 U.S.C. §51, et. seq., to recover damages for his injuries. The case came on for trial before a jury and upon conclusion of the presentation of evidence on behalf of the plaintiff, the trial court granted the defendants' motion for directed verdict. This appeal is from the judgment entered thereon.

Taking the case away from the jury in this instance was not done in conflict with the rule pronounced by the Supreme Court of the United States in Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493, as recognized and quoted by the Supreme Court of Florida in Atlantic Coast Line Railroad Company v. Barrett, Fla. 1958, 101 So. 2d 37. The Rogers case lays down a rule as to the quantum of proof relating to the employer's negligence in F.E.L.A. cases which requires submission of the claim to a jury for its determination. According to the Rogers decision, to borrow the language of the United States Supreme Court:

> "Under this statute [Federal Employer's Liability Act, 45 U.S.C.A. §51 et seq.] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion

> may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or **in part**' to its negligence."

But even under that unexacting test it is necessary to present sufficient evidence to show some negligence, or from which a jury could with reason infer that some negligence of the employer produced the injury. That requirement of proof is not met by showing that an injury occurred through use of a mechanism not shown to be defective, and which had not been reported as defective, and with the reason for the accident not known.

Here the plaintiff, a hose cutter for the railroad, properly and in the course of his duties, crossed through a passenger car on a train being made up. The raised platform floor or trap door, secured by a latching device, fell and injured plaintiff's hand as he alighted using the handrail. The latch was not shown to be defective, and the plaintiff did not know how or why the door injured him.

Plaintiff relied on evidence that the door would not fall or close unless either the latching device was defective or someone had left it unlatched or partially latched and therefore in a dangerous condition. Evidence was lacking as to the actual recent inspection history of that particular device, but plaintiff produced evidence of the cus-

tom before making up such trains to inspect the cars including such doors and their latching devices.

The pivotal question then becomes whether from the happening of this accident it may reasonably be inferred that the device was defective; that the defect was one which could have and should have been noted on inspection; that inspection was lacking or done imperfectly and the car released for use in a condition of disrepair; or that although the device was not defective, it failed to perform its function because not completely secured, and that the insecure condition was created by an agent or employee of the defendant.

To hold that the evidence as to this accident could with reason support a finding that the employer's negligence contributed to produce the injury would be close to, if not all the way toward holding that an accident, in absence of an uncontrovertible explanation to the contrary, is enough to create a reasonable inference that the employer's negligence produced it. It seems reasonable to assume that the Rogers case intended no such result. Cf. Milom v. New York Central Railroad Company, (7 Cir. 1957) 248 F.2d 52, **cert. den.**, 355 U.S. 953, 78 S.Ct. 537, 2 L.Ed. 2d 529; Baum v. Baltimore & Ohio Railroad Company, (7 Cir. 1958) 256 F. 2d 753, **cert. den.**, ___ U.S. ___, 79 S.Ct. 121, 3 L.Ed. 2d 111.

For the reasons stated the trial judge was eminently correct in granting defendants' motion for directed verdict in this cause and the judgment thereon is affirmed.

Affirmed.

PEARSON, J., and LOPEZ, AQUILINO, JR., Associate Judge, concur.

APPENDIX B

ORDER OF SUPREME COURT OF FLORIDA DENYING CERIORARI

IN THE SUPREME COURT OF FLORIDA—JANUARY TERM, A.D. 1959—TUESDAY, JUNE 16, 1959

J. C. CONNER,

Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, Trustees of the property of FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date of February 12, 1959, (petition for rehearing denied March 11, 1959), and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

APPENDIX C

STATUTE INVOLVED

The Federal Employees Liability Act, 45 U.S.C. Section 51, provides:

"Sec. 51—LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate

or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

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October Term, 1960

No. 328

J. C. CONNER,

v.

J. TURNER BUTLER & WILLIAM A. HALLOWES, as Trustees of the property of the FLORIDA EAST COAST RAILWAY COMPANY, a corporation.

RESPONDENTS' BRIEF IN OPPOSITION

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Attorney for Respondents

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. ———

J. C. CONNER,

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J. TURNER BUTLER & WILLIAM A. HALLOWES, as Trustees of the property of the FLORIDA EAST COAST RAILWAY COMPANY, a corporation.

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF FACTS

Petitioner has made certain statements, purportedly documented by references to the Record, which we feel are inaccurate. He states on page 2 of his Petition:

> ". . . the train, including the car and steps in question had just been inspected and such inspections, if done properly, reveal the defects, if any, which would cause the door to fall during normal use; . . ."

We submit that there was not one shred of evidence as to inspection or the lack of it of the particular car on

which petitioner claims to have been injured. Nor was there any evidence of any defect in the steps or whether such defect, if any, was discoverable.

On page 3 of his Petition he states:

> "The train had come from Buena Vista Yard where it had been seen steam cleaned and inspected."

The evidence showed only that at about the period of time when petitioner was injured it was customary to take incoming trains to the yards where the cars were inspected and cleaned, some cut out for repairs, and later made up into another train (R. 73-74). The Record is silent as to the particular car or train on which petitioner claims to have been injured.

On page 6 of his Petition, Conner states:

> "Where the last user was the railroad's own inspector who could and should have discovered any defect...."

Again, this statement goes beyond any supporting evidence in the Record, which contains nothing to document this statement.

Petitioner's evidence showed only that he walked up the steps of a passenger car that was part of a train loading for departure. He crossed the vestibule and started down the steps on the opposite side.

The steps were down and the trap door was up. They

appeared to be in good order. Gripping the handrail attached to the trap door (R. 44), he went down the steps. He released his hold on the handrail, He noticed nothing unusual. Then he stepped off the bottom step, the trap fell and he broke his thumb (R. 106-110).

QUESTION PRESENTED

WHETHER OR NOT THE OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, WHICH EXPRESSLY RECONIZES AS CONTROLLING AND FOLLOWS THE DECISION OF THIS COURT IN *ROGERS* v. *MISSOURI PACIFIC R. CO.*, 352 U.S. 500, IN AN ACTION BROUGHT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, RAISES ANY ISSUE SUFFICIENT TO WARRANT THE ATTENTION OF THIS COURT.

ARGUMENT

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, this Court stated that in dertermining whether a prima facie case had been made out in an action under the Federal Employers' Liability Act, the test was:

> "whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

The District Court of Appeal of Florida, Third District, applied this test and found that on the evidence introduced petitioner had failed to make out a case.

That court quoted at length from the *Rogers* decision and expressly followed it. The opinion of the court says only that proof of the happening of an accident, without more, is not enough to establish a prima facie case on the particular facts involved here.

No new issue is raised; no question is raised here that was not settled by this Court in the *Rogers* case.

Instead of introducing evidence from which a jury, directly or circumstantially, could find that respondents were in some way negligent, petitioner's proof showed only the happening of an accident in which he broke his thumb.

There was no evidence relating to inspection, when an inspection was made, the interval between inspection and injury, or failure to inspect the car on which Conner was injured. There was no evidence of anyone latching, unlatching or failing to latch the trap door.

The Record contains no evidence showing whether anybody other than Conner, did or did not touch the trap door prior to the accident, and, if anyone did, who it was and when it occured. The Record is silent as to whether passengers, railroad employees or others were or were not on the train and had access to the particular doorway where Conner hurt his thumb.

Petitioner introduced no evidence on the questions whether or not the latch on the trap door was defective, whether the defect, if any, was discoverable, and the length of time that the defect, if any, had or should have been known to respondents.

Petitioner did introduce evidence from an expert witness, a physicist, which refutes his own testimony as to the way the accident occurred. Conner stated that he went down the steps, turned around, took his hands off the handrails, **then stepped off** and the trap door fell on his thumb. (R. 107-110).

Conner's expert stated that, even if the trap door were raised but unlatched, any weight on the steps would tend to hold it up. The only way it could fall would be if someone held the handrail **after** he stepped off the steps. (R. 150, 154, 155).

REASONS FOR DENYING THE WRIT

The opinion which petitioner asks this Court to review recognized and followed the pronouncements of this Court in *Rogers* v. *Missouri Pacific R. Co.* 352 U.S. 500. The two decisions are entirely in accord. This case raises no question of construction of the Federal Employers' Liability Act and no new questions that require the attention of this Court.[1]

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Attorney for Respondents

[1]The statement on page 3 of the Petition that J. C. Conner is colored not only goes outside the Record but appears to be an unseemly attempt to inject by indirection and for the first time a racial issue in no way connected with the case.